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Attorneys for Defendants K-M Industries Holding Co. Inc.; K-M Industries Holding Co. Inc. ESOP Plan Committee; and CIG ESOP Plan Committee

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
OAKLAND DIVISION**

THOMAS FERNANDEZ, LORA SMITH  
and TOSHA THOMAS, individually and on  
behalf of a class of all others similarly  
situated,

Plaintiffs,

V.

K-M INDUSTRIES HOLDING CO., INC.,  
*et al.*

**Defendants.**

Case No. C06-07339 CW

**DECLARATION OF TERENCE F.  
YOUNG IN SUPPORT OF  
DEFENDANTS K-M INDUSTRIES  
HOLDING CO., INC., K-M  
INDUSTRIES HOLDING CO. INC.  
ESOP PLAN COMMITTEE AND CIG  
ESOP PLAN COMMITTEE'S  
ADMINISTRATIVE MOTION TO  
FILE DOCUMENTS UNDER SEAL**

**CIVIL LOCAL RULE 79-5(b) AND (c)**

I, Terence F. Young, declare:

1. I am an attorney licensed to practice in the State of California and before this Court.

I am associated with Lovitt & Hannan, Inc., attorneys for Defendants K-M Industries Holding Co. Inc., K-M Industries Holding Co. Inc. ESOP Plan Committee, and CIG ESOP Plan Committee (the

1 “KMH defendants”) in this matter. I have custody of the relevant files of Lovitt & Hannan, Inc.  
2 related to this action and am familiar with the contents thereof. I make this declaration pursuant to  
3 L.R. 79-5(b) and (c) to establish that certain documents designated by defendants to be confidential  
4 and submitted by defendants in support of the concurrently-filed Motion for Summary Judgment by  
5 the KMH defendants should be sealed and not made part of the Court’s public files.

6 2. K-M Industries Holding Co. Inc. (“KMH”) is a privately-held corporation comprising  
7 two operating subsidiaries, Kelly-Moore Paint Company and Capital Insurance Group. Prior to  
8 1999, KMH was known as Kelly Moore Paint Co., Inc. KMH maintains its financial and accounting  
9 records, minutes of directors and shareholders meetings, and other materials related to its operation  
10 and operating results in strictest confidence and treats such matters as trade secrets. KMH’s shares  
11 are not traded publicly and the estimated value of those shares is likewise a closely-guarded trade  
12 secret of KMH. Both of KMH’s subsidiaries are engaged in highly-competitive industries.  
13 Revealing KMH’s confidential information in the public records of this Court potentially could  
14 harm the privacy interests of KMH and put it and its subsidiaries at a competitive disadvantage.

15 3. Plaintiffs’ claims in the captioned lawsuit are premised on alleged violations of  
16 Employee Retirement Income Security Act (“ERISA”). In the context of such litigation, the courts  
17 have established that certain communications between ERISA Plan administrators, acting as  
18 fiduciaries, and the attorneys retained by them, that normally would be protected from discovery by  
19 the attorney-client privilege, are subject to a “fiduciary exception” to that privilege. As a  
20 consequence, the attorney-client privilege does not bar the discovery by Plan beneficiaries, such as  
21 plaintiffs in this action, of otherwise privileged communications. *United States v. Mett*, 178 F.3d  
22 1058, 1063 (9th Cir. 1999). Communications subject to the fiduciary exception retain their  
23 privileged status as to anyone other than the fiduciary and the beneficiaries. Some documents and  
24 declarations submitted by the KMH defendants in support of their motion for summary judgment  
25 were produced in discovery in this matter because they were subject to the fiduciary exception.

1 Nevertheless, the KMH defendants continue to claim privilege as to such documents and testimony  
2 and continue to assert a claim of privilege as to anyone other than defendants and plaintiffs in this  
3 lawsuit.

4 4. Listed below are descriptions of the portions of the identified declarations and  
5 exhibits to such declarations filed in support of the KMH defendants' motion for summary judgment  
6 and the basis for KMH's claim that such declarations and exhibits either are privileged or  
7 confidential.

8 **Declaration of Stephen Ferrari in Support of Motion For Summary Judgment by**  
9 **Defendants K-M Industries Holding Co., Inc., K-M Industries Holding Co. Inc. ESOP Plan**  
10 **Committee and CIG ESOP Plan Committee ("Ferrari Decl.")**

11 5. Ferrari Decl., Paragraph 7. The highlighted portion of paragraph 7 of the Ferrari  
12 Decl. comprises the substance of communications between the attorney for Kelly-Moore Paint  
13 Company, Inc., Cheryl Mills of Pillsbury, Levinson & Mills, and the auditors for this privately-held  
14 company. Such communications are maintained as confidential by the company and their release to  
15 the general public and competitors could negatively effect KMH's competitive advantage.

16 6. Ferrari Decl., Paragraph 8. The highlighted portion of paragraph 8 of the Ferrari  
17 Decl. comprises the substance of communications between officers of Kelly-Moore Paint Company  
18 and its attorney, Cheryl Mills. On December 3, 2007, Judge Bernard Zimmerman held, in response  
19 to plaintiffs' motion to compel and after *in camera* review, that the document reflecting such  
20 communications was subject to the fiduciary exception. The communications are, nevertheless,  
21 subject to the attorney-client privilege as to third parties and should not become part of the public  
22 record.

23 7. Ferrari Decl., Paragraph 10. The highlighted portion of paragraph 10 of the Ferrari  
24 Decl. comprises the substance of communications between an officer of Kelly-Moore Paint  
25 Company, Inc., and its attorney, Cheryl Mills of Pillsbury, Levinson & Mills, as conveyed to

1 appraisers estimating the value of the shares of this privately-held company. Such communications  
2 are maintained as confidential by the company and their release to the general public and  
3 competitors could negatively effect KMH's competitive advantage.

4 8. Ferrari Decl., Paragraph 11. The highlighted portion of paragraph 11 of the Ferrari  
5 Decl. comprises the substance of communications between officers of Kelly-Moore Paint Company  
6 and its attorney, Cheryl Mills. Such communications are subject to the fiduciary exception in this  
7 matter but are, nevertheless, subject to the attorney-client privilege as to third parties and should not  
8 become part of the pubic record.

9 9. Ferrari Decl., Paragraph 24. The highlighted portion of paragraph 24 of the Ferrari  
10 Decl. comprises the substance of communications between the attorney for Kelly-Moore Paint  
11 Company, Inc., Cheryl Mills of Pillsbury, Levinson & Mills, and the auditors for this privately-held  
12 company. Such communications are maintained as confidential by the company and their release to  
13 the general public and competitors could negatively effect KMH's competitive advantage.

14 10. Ferrari Decl., Exhibit 2 (entire document). Exhibit 2 is a letter from the attorney for  
15 Kelly-Moore Paint Company, Inc., Cheryl Mills, to the auditors for this privately-held company.  
16 Such communications are maintained as confidential by the company and their release to the general  
17 public and competitors could negatively effect KMH's competitive advantage.

18 11. Ferrari Decl., Exhibit 3 (entire document). Exhibit 3 is a hand-written note reflecting  
19 the substance of a communication between officers of Kelly-Moore Paint Company and its attorney,  
20 Cheryl Mills. On December 3, 2007, Judge Bernard Zimmerman held, in response to plaintiffs'  
21 motion to compel and after *in camera* review, that Exhibit 3 was subject to the fiduciary exception.  
22 The document is, nevertheless, subject to the attorney-client privilege as to third parties and should  
23 not become part of the pubic record.

24 12. Ferrari Decl., Exhibit 4 (entire document). Exhibit 4 is a letter from Kelly-Moore  
25 Paint Company's attorney, Cheryl Mills, to its President on the subject of available insurance

1 coverage for asbestos claims against the company. It was produced in this matter as subject to the  
2 fiduciary exception to the attorney-client privilege. Nevertheless, it is subject to the attorney-client  
3 privilege as to third parties and should not become part of the public record.

4 13. Ferrari Decl., Exhibit 14 (entire document). Exhibit 14 is a letter from the attorney  
5 for Kelly-Moore Paint Company, Inc., Cheryl Mills, and the auditors for this privately-held  
6 company. Such communications are maintained as confidential by the company and their release to  
7 the general public and competitors could negatively effect KMH's competitive advantage.

8 **Declaration of Joseph Cristiano in Support of Motion For Summary Judgment by**  
9 **Defendants K-M Industries Holding Co., Inc., K-M Industries Holding Co. Inc. ESOP Plan**  
**Committee and CIG ESOP Plan Committee ("Cristiano Decl.")**

10 14. Cristiano Decl., Paragraph 5. The highlighted portion of paragraph 5 of the Cristiano  
11 Decl. comprises the substance of communications between the attorney for Kelly-Moore Paint  
12 Company, Inc., Cheryl Mills of Pillsbury, Levinson & Mills, and the auditors for this privately-held  
13 company. Such communications are maintained as confidential by the company and their release to  
14 the general public and competitors could negatively effect KMH's competitive advantage.

15 15. Cristiano Decl., Paragraph 6. The highlighted portion of paragraph 6 of the Cristiano  
16 Decl. comprises the substance of communications between officers of Kelly-Moore Paint Company  
17 and its attorney, Cheryl Mills. Such communications are subject to the fiduciary exception in this  
18 matter but are, nevertheless, subject to the attorney-client privilege as to third parties and should not  
19 become part of the public record.

20 16. Cristiano Decl., Paragraph 7. The highlighted portion of paragraph 7 of the Cristiano  
21 Decl. comprises the substance of communications between officers of Kelly-Moore Paint Company  
22 and its attorney, Cheryl Mills. Such communications are subject to the fiduciary exception in this  
23 matter but are, nevertheless, subject to the attorney-client privilege as to third parties and should not  
24 become part of the public record.

1           17.     Cristiano Decl., Paragraph 8. The highlighted portion of paragraph 8 of the Cristiano  
2 Decl. comprises the substance of communications between the attorney for Kelly-Moore Paint  
3 Company, Inc., Cheryl Mills, and the auditors for this privately-held company. Such  
4 communications are maintained as confidential by the company and their release to the general  
5 public and competitors could negatively effect KMH's competitive advantage.

6           18.     Cristiano Decl., Paragraph 9. The highlighted portion of paragraph 9 of the Cristiano  
7 Decl. comprises the substance of communications between officers of Kelly-Moore Paint Company  
8 and its attorney, Cheryl Mills. Such communications are subject to the fiduciary exception in this  
9 matter but are, nevertheless, subject to the attorney-client privilege as to third parties and should not  
10 become part of the pubic record.

11           19.     Cristiano Decl., Exhibit 1 (entire document). Exhibit 1 is a letter from the attorney  
12 for Kelly-Moore Paint Company, Inc., Cheryl Mills, to the auditors for this privately-held company.  
13 Such communications are maintained as confidential by the company and their release to the general  
14 public and competitors could negatively effect KMH's competitive advantage.

15           20.     Cristiano Decl., Exhibit 2 (entire document). Exhibit 2 is a letter from Kelly-Moore  
16 Paint Company's attorney, Cheryl Mills, to its President on the subject of available insurance  
17 coverage for asbestos claims against the company. It was produced in this matter as subject to the  
18 fiduciary exception to the attorney-client privilege. Nevertheless, it is subject to the attorney-client  
19 privilege as to third parties and should not become part of the pubic record.

20           21.     Cristiano Decl., Exhibit 3 (entire document). Exhibit 3 is a letter from the attorney  
21 for Kelly-Moore Paint Company, Inc., Cheryl Mills, and the auditors for this privately-held  
22 company. Such communications are maintained as confidential by the company and their release to  
23 the general public and competitors could negatively effect KMH's competitive advantage..

24           **Declaration of Dan Stritmatter in Support of Motion For Summary Judgment by**  
25           **Defendants K-M Industries Holding Co., Inc., K-M Industries Holding Co. Inc. ESOP Plan**  
              **Committee and CIG ESOP Plan Committee ("Stritmatter Decl.")**



1  
2 22. Stritmatter Decl., Exhibit 3 (entire document). Exhibit 3 is the Unanimous Written  
3 Consent of the Board of Directors of Kelly-Moore Paint Company, Inc., effective September 30,  
4 1998, and includes a copy of the Amended and Restated Articles of Incorporation of this privately-  
5 held company and an asset purchase agreement. Exhibit 3 comprises confidential information  
6 concerning the internal workings of KMH and its predecessor, Kelly Moore Paint Company. Such  
7 information is maintained as strictly confidential by the company and its release to the general  
8 public and competitors could negatively effect KMH's competitive advantage.

9 23. Stritmatter Decl., Exhibit 5 (entire document). Exhibit 5 is Minutes of a Joint Special  
10 Meeting of the Boards of Directors of K-M Industries Holding Co., Inc. and Kelly Moore Paint  
11 Company, Inc., dated February 28, 2003. Such internal operating information of both privately-held  
12 companies is maintained as strictly confidential by them and its release to the general public and  
13 competitors could negatively effect KMH's competitive advantage.

14 24. Stritmatter Decl., Exhibit 6 (entire document). Exhibit 6 is a letter from the attorney  
15 for Kelly-Moore Paint Company, Inc., Cheryl Mills, to the auditors for this privately-held company.  
16 Such communications are maintained as confidential by the company and their release to the general  
17 public and competitors could negatively effect KMH's competitive advantage.

18 25. Stritmatter Decl., Exhibit 7 (entire document). Exhibit 7 is a letter from the attorney  
19 for Kelly-Moore Paint Company, Inc., Cheryl Mills, and the auditors for this privately-held  
20 company. Such communications are maintained as confidential by the company and their release to  
21 the general public and competitors could negatively effect KMH's competitive advantage..

22 26. Stritmatter Decl., Exhibit 8 (entire document). Exhibit 8 comprises the Consolidated  
23 Financial Statements of the Kelly-Moore Paint Company, Inc., Years Ended December 31, 1998 and  
24 1997, with Report of Independent Auditors. Such financial data is maintained as strictly  
25 confidential by this privately-held company and its release to the general public and competitors

1 could negatively effect KMH's competitive advantage.

2 27. Stritmatter Decl., Exhibit 9 (entire document). Exhibit 9 comprises the Consolidated  
3 Financial Statements of the Kelly-Moore Paint Company, Inc., Years Ended December 31, 1999 and  
4 1998, with Report of Independent Auditors. Such financial data is maintained as strictly  
5 confidential by this privately-held company and its release to the general public and competitors  
6 could negatively effect KMH's competitive advantage.

7 28. Stritmatter Decl., Exhibit 12 (entire document). Exhibit 12 comprises the  
8 Consolidated Financial Statements, Kelly-Moore Paint Company, Inc. for the Years Ended  
9 December 31, 2001 and 2000, with Report of Independent Auditors. Such financial data is  
10 maintained as strictly confidential by this privately-held company and its release to the general  
11 public and competitors could negatively effect KMH's competitive advantage..

12 29. Stritmatter Decl., Exhibit 13 (entire document). Exhibit 13 comprises the  
13 Consolidated Financial Statements, Kelly-Moore Paint Company, Inc. for the Years Ended  
14 December 31, 2002 and 2001, with Report of Independent Auditors. Such financial data is  
15 maintained as strictly confidential by this privately-held company and its release to the general  
16 public and competitors could negatively effect KMH's competitive advantage.

17 **Declaration of Peter M. Cazzolla in Support of Motion For Summary Judgment by**  
18 **Defendants K-M Industries Holding Co., Inc., K-M Industries Holding Co. Inc. ESOP Plan**  
**Committee and CIG ESOP Plan Committee ("Cazzolla Decl.")**

19 30. Cazzolla Decl., Paragraph 6. The highlighted portion of paragraph 6 of the Cazzolla  
20 Decl. relates to the subject of financial effects of litigation against KMH by plaintiffs claiming  
21 personal injuries from exposure to asbestos. Repeating the exact nature of those statements in this  
22 declaration would defeat the purpose of maintaining their confidentiality. Kelly Moore has carefully  
23 maintained the confidentiality of its internal discussions of the financial effects of such litigation and  
24 continues to believe that the public revelation of such considerations would damage its public image  
25

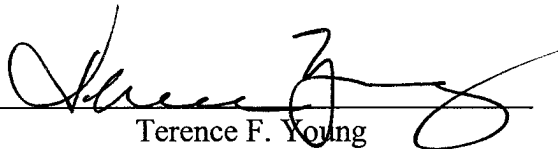


1 and its business.

2 31. Cazzolla Decl., Paragraph 9. The highlighted portion of paragraph 9 of the Cazzolla  
3 Decl. relates to the subject of financial effects of litigation against KMH by plaintiffs claiming  
4 personal injuries from exposure to asbestos. Repeating the exact nature of those statements in this  
5 declaration would defeat the purpose of maintaining their confidentiality. Kelly Moore has carefully  
6 maintained the confidentiality of its internal discussions of the financial effects of such litigation and  
7 continues to believe that the public revelation of such considerations would damage its public image  
8 and its business.

9 I declare under penalty of perjury under the laws of the United States of America that the  
10 foregoing is true and correct.

11  
12 DATED: June 26 2008

13  
14   
15 Terence F. Young